



SMITHSON v (1) LYNN (2) NORTH YORKSHIRE CC

[2020] EWHC 2517 (QB)

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HHJ Gosnell (sitting as a Judge of the High Court) in the first reported decision on the subject, considered the applicability of section 41(1A) of the Highways Act 1980* and where the burden of proof lay in showing “reasonable practicability”.

[*”In particular, a highway authority are under a duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice”]

THE FACTS

The Claimant was a passenger in a vehicle being driven by the First Defendant (D1) along a road for which the Second Defendant was the highway authority (D2). The vehicle left the road and struck a tree, with the Claimant suffering significant injury. The Claimant alleged that D1 was driving too fast and did not maintain adequate control. D1 denied liability on the basis that there was black ice and therefore no lack of care on his part. D1 brought contribution proceedings against the D2 for their failure to treat the road on the basis that they ignored two requests to treat the road. D2 was made a second Defendant by the Claimant.

Shortly prior to trial, D1 settled with the Claimant and with the matter proceeding on the contribution proceedings.

THE ISSUES

1. Where did the burden lie in showing “reasonable practicability” under section 41(A) of the Highways Act 1980?
2. What amounts to “reasonable practicability”?

THE FIRST ISSUE

D2 argued that the burden of proof remained on the Claimant throughout as section 41(1A) contained what the Claimant had to prove so as to found a breach of the section.

D1 argued that the phrase “reasonable practicability” was well used throughout other legislation where the burden lay on the Defendant to plead and prove it.

HHJ Gosnell ruled that as section 41(1A) was qualified by the use of the term “reasonable practicability” and to ensure compatibility with section 58 of the 1980 Act, the burden lay on the highway authority to prove.

THE SECOND ISSUE

HHJ Gosnell considered the relevant authorities and ruled that a highway authority was not required to take all steps falling short of the “grossly disproportionate”. The highway authority was however still required to consider the matter by deciding where the balance lay between the “quantum of risk”

(i.e. the likelihood and severity of an adverse outcome) against the cost and inconvenience of ameliorating that risk.

On the facts of this case, on the quantum of risk, it was foreseeable that there was a risk of an accident.

On the cost and inconvenience of ameliorating the risk, the court accepted that it was reasonable to have a system of prioritisation for treatment of highways for ice. The duty did not extend to every mile of road. Further no system could deal with every request for ad hoc treatment. Having a policy that stated that only in exceptional circumstances would it be departed from would not necessarily amount to a breach.

On the facts of this case, the Judge considered that D2 applied a constricted approach to its own policy and therefore were in breach of their duty.

ANALYSIS

As the winter period descends upon us, the potential for such claims increases.

This case makes it clear that the burden of proof is on the highway authority to show that it had taken reasonable practicable measures.

A highway authority will have to demonstrate that it had a policy in place for such eventualities and prioritising routes is perfectly reasonable. A failure to respond to an ad hoc request would not necessarily result in there being a breach. A straight jacket approach is however likely to result in the highway authority being found in breach of their duty under section 41(1A)

The facts of this case show that the highway authority adopted a very constricted approach to their own policy and failed to react to an unfolding situation and thus emphasises that each case will turn on its own very specific facts.

Disclosure of winter policies and how they are applied in practice will be critical to the successful prosecution (or defence of such claims). The clarification of where the burden of proof lies does mean that the central issue will be: can the highway authority show that it had taken reasonable practicable measures to safeguard against such situations?

Mere production of a policy will not be sufficient to rebut such a claim but if the highway authority can show that it responds to an evolving situation, the highway authority may well make out the statutory defence.

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